WITHIN OR AFTER A GIVEN TIME.

The computation of periods of time within which, or after which, acts may be done, has been a source of repeated litigation and is a matter of continual perplexity to both lawyer and layman. This confusion, of course, results from the salutary general rule of law which takes no cognizance of fractions of a day. The Supreme Court of Virginia has wrestled with the problem frequently and with diverse results.

The Virginia Rules.

In Bowles *v.* Brauer, 89 Va. 466, 16 S. E. 356, where the notice was first published on March 5th and sale made on March 10th, it was held that the sale had been made "after first advertising * * * for five days," as required in the deed of trust. The court said that clause 8 of § 5 of the Code did not apply, and computed the time by excluding the first day and counting the last. But, if the statute had been followed, the result would have been the same.

In Homestead Fire Ins. Co. *v.* Ison, 110 Va. 18, 65 S. E. 463, an insurance policy provided that it should be void, if an inventory of the goods therein mentioned was not made *within thirty days* from the issuance of the policy, which was dated February 8th, 1907. No inventory was made, and the fire occurred at eleven o'clock on the night of March 10th, 1907. The court, excluding the first day and including the last, said that there was one hour left.

In Turnbull *v.* Thompson, 68 Va. (27 Gratt.) 306, where the process was served on February 3rd, 1862, and the judgment by default became final on March 3rd, 1862, the court decided that the judgment was valid under Code 1860, ch. 170, § 6, as it did not become final *within one calendar month* after service of the process.

In Swift & Co. *v.* Wood, 103 Va. 494, 49 S. E. 643, a notice under § 3211 of the Code was served on February 21st, 1901, and returned to the clerk's office on the 26th of the same month, and the court held that the notice was not returned *within five days after service.*

And in Jennings *v.* Pocahontas Consol. Collieries Co., 114 Va. 213, 76 S. E. 298, the process was returned to the clerk's office on March 6th, 1911, and the declaration filed on April 6th, 1911, and it was held that, under § 3241 of the Code, *one calendar month had elapsed* after the return of the process without the declaration being filed.

The court, in the last three cases, relied upon the language of the Code, § 5, clause 8, which provides that: "Where a statute requires a notice to be given, or any other act to be done, a certain time before any motion on proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given or such act is done, may be counted as part of the time." But, from a careful reading of the statute, it is apparent that its terms do not apply to the facts in either of the two cases last mentioned; and it is difficult to see how the court applied the same, save perhaps by analogy.

The conflict in the above cases is in the computation of the time *within* which an act may or may not be done, the Code method allowing one day less than the general rule. As to the time *from or after* a given date, either rule gives the same result.

So in Virginia there is one rule applicable to statutes and another to contracts, which is both confusing and unnecessary.

THE GENERAL RULE.

The great weight of authority is in favor of excluding one of the termini and including the other. The same result is attained whether the first day be excluded and the last included, or vice versa. But it seems more rational to follow the first method, as no moment of time can be said to be after a given day until that day has expired. And the general rule, whether the computation be made of the time within which an act may or may not be done, or of the time before or after a given date, is to exclude the first day designated and include the last day of the period. 2 Minor, 4th Ed., p. 190; Homestead Fire Ins. Co. *v.* Ison, 110 Va. 18, 65 S. E. 463; Eastern Oil Co. *v.* Coulehan, 65 W. Va. 531, 64 S. E. 836; 28 Am. & Eng. Enc., 2nd Ed., 211-219.

SOME DIFFICULTIES.

The general rule is certainly the most natural and the least perplexing; for it is indeed awkward to count the first day designated and then at the end of the required period add another day for good measure; and, in excluding the last day, one is always liable to err by counting it against the actor instead of allowing it to him. In Swift & Co. *v.* Wood, 103 Va. 494, 49 S. E. 643, the court really included both termini, and said in substance that February 21st to 26th, both inclusive, made six days, and that the notice was returned on the sixth day and therefore not within five days. Under such reasoning, an act required to be done within one day would have to be done the same day, and frequently, in actual practice, would have to be done almost immediately.

The difficulty, however, in following the general rule is that the same act may be said to have been done either *within* or *after* the stated time. In other words, if the general rule be applied in Swift & Co. *v.* Wood, 103 Va. 494, 49 S. E. 643, the notice was returned *within five days* and also *after five days;* and likewise in regard to the other cases cited. Take the provision in the Code, § 2942, that "no such trial shall be had within five days after service;" a trial held after five days notice under the general rule, could also be within five days, and therefore not in compliance with the statute. Again, "shall not be done after five days" might be violated, although the act were done within five days. Of course, if days were reckoned with mathematical exactitude at twenty-four hours each, this difficulty would not arise, since a notice served on the first of the month at noon sharp could, during the sixth, be returned *within five days* at any moment in the forenoon, or *after five days* at any time in the afternoon.

It has been held that such expressions as, "after ten days have elapsed" and "after the expiration of ten days," call for the elapsing of clear or entire days, and that both termini must be excluded. 28 Am. & Eng. Enc., 2nd Ed., 221. But to adopt a rule excluding both termini would be unfortunate, as the maturity of negotiable paper, and practically all business computation, is governed by the general rule.

PROPOSED SOLUTION.

If possible, a simple rule should be adopted which will dispose of all practical difficulties and which will apply to terms either statutory or contractual.

To that end it is suggested that the Virginia statute be revised to read as follows: "Unless otherwise required by the statute or contract under consideration, the time from or after which, or after the expiration of which, an act may be done, or the time before or after a given day or date, shall be computed by excluding the first day designated and including the last day of the period; and the time within which an act may or may not be done, shall be computed by including both termini."

It is believed that such a revision would avoid much perplexity and frequently prevent unnecessary and expensive litigation.

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